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No. 03-20

In the Supreme Court of the United States

FLORIDA MUNICIPAL POWER AGENCY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that the Federal Energy Regulatory Commission adequately considered arguments petitioner made in an administrative proceeding.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Bowman Transp., Inc. v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281 (1974)	6
Motor Vehicle Mfrs. Ass'n, v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)	6
New York v. *FERC*, 535 U.S. 1 (2002)	4

Statutes:

Federal Power Act, 16 U.S.C. 791a *et seq.*:	
§ 201(b), 16 U.S.C. 824(b)	2
§ 211(a), 16 U.S.C. 824j(a)	2
§ 212(a), 16 U.S.C. 824k(a)	2

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 315 F.3d 362. The orders of the Federal Energy Regulatory Commission are reported at 96 F.E.R.C. ¶ 61,130 (Pet. App. B1-B8), 74 F.E.R.C. ¶ 61,006 (Pet. App. B9-B72), and 67 F.E.R.C. ¶ 61,167 (Pet. App. B73-B114).

JURISDICTION

The judgment of the court of appeals was entered on January 21, 2003. A petition for rehearing was denied on March 28, 2003 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on June 26, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 201(b) of the Federal Power Act (FPA), 16 U.S.C. 824(b), confers on the Federal Energy Regulatory Commission (FERC or Commission) jurisdiction to determine the rates, terms, and conditions of public utilities' electric transmission service in interstate commerce. Section 211(a) of the FPA, 16 U.S.C. 824j(a), provides that an electric utility or other person "generating electric energy for sale for resale, may apply to the Commission for an order under this subsection requiring a transmitting utility to provide transmission services * * * to the applicant." 16 U.S.C. 824j(a). Orders under Section 211(a) "shall require the transmitting utility subject to the order to provide wholesale transmission services at rates, charges, terms, and conditions which permit the recovery by such utility of all the costs incurred in connection with the transmission services." 16 U.S.C. 824k(a). "[T]o the extent practicable," costs that a utility incurs in providing transmission service under a Section 211 order are to be recovered from the applicant for the order. 16 U.S.C. 824k(a).

2. Petitioner is a public agency in Florida that provides electric power to its member municipal utilities. Pet. App. A5. In 1993, petitioner applied to FERC under Section 211(a) for an order requiring Florida Power & Light Company (Florida Power) to provide petitioner electric transmission service. FERC ordered Florida Power to provide the requested service and directed the parties to agree on rates, conditions, and terms of service. *Id.* at A5, B115-B176. After the parties failed to agree, FERC entered an order that generally adopted Florida Power's pricing proposal, see *id.* at B99, but also stated that petitioner would be

entitled to a credit against Florida Power's transmission charges if it could show that its own transmission facilities "operate as part of [an] integrated transmission system" with Florida Power's facilities, *id.* at B101 n.76. See *id.* at A5-A6.

Petitioner then asked FERC to enter an order establishing that, due to network integration, petitioner is entitled to credits that entirely offset Florida Power's transmission charges. In January 1996, FERC denied petitioner's request. See Pet. App. B18-B29. Based on the evidence submitted by the parties, FERC concluded that, although petitioner's member municipal utilities interconnect their transmission facilities with Florida Power's transmission system, the members' facilities do not "operate[] as part of the Florida Power integrated transmission network." *Id.* at B27; see *id.* at B25-B29.

Petitioner requested rehearing of FERC's denial of credits. See Pet. App. B1-B8. In July 2001, after various intervening developments, see *id.* at B2, FERC denied rehearing. FERC identified "[t]he key issue in the case [a]s whether [petitioner's] facilities are integrated with Florida Power's transmission system, such that [petitioner] would be entitled to receive credit * * * for transmission facilities owned by [petitioner] or its members." *Id.* at B1-B2. To answer that question, FERC first recalled its earlier conclusion, in January 1996, that the record evidence established network interconnection rather than network integration. *Id.* at B5. FERC next explained that, in an intervening rulemaking concerning nondiscriminatory access to electric utilities' transmission services, it had "elaborated on the criteria necessary to meet the system integration test" (*ibid.*) and confirmed that interconnection of transmission facilities does not alone establish

integration. See *id.* at B5-B6; see generally *New York* v. *FERC*, 535 U.S. 1, 11-14 (2002) (discussing FERC Order Nos. 888 and 888-A). FERC then stated:

> [Petitioner] has not demonstrated, nor does [petitioner] even argue, that its facilities meet the test. Neither does [petitioner] dispute the findings in [FERC's January 1996 order] that the interconnections are primarily single points used only to transfer power between the Florida Power transmission system and that of each [of petitioner's member utilities]. Accordingly, the Commission affirms its ruling in [the January 1996 order].

Pet. App. B6.

3. The court of appeals denied petitioner's ensuing petition for review. Pet. App. A2-A14. In relevant part, the court deemed FERC's statement that petitioner "has not demonstrated, nor does [it] even argue, that its facilities meet the test" (*id.* at B6) to be an "enigma" (*id.* at A10). Nevertheless, the court determined that "[t]his enigma is not fatal," because "FERC understood [petitioner's] arguments and its evidence," and "substantial evidence supports FERC's denial of pricing credits." *Ibid.*

The court of appeals initially observed that, in seeking rehearing of FERC's January 1996 decision denying the request for credits, petitioner did not present any additional evidence showing integration. Pet. App. A10. Then, the court identified record evidence supporting FERC's determination that petitioner's member utilities interconnect with Florida Power rather than contributing facilities to an integrated transmission system. *Id.* at A10-A12. The court concluded that the evidence before FERC was sufficient to support FERC's determination that petitioner and Florida

Power do not operate an integrated system, despite "some contradictory evidence" on which petitioner had relied. *Id.* at A12.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Review by this Court is not warranted.

1. Petitioner argues (Pet. 7-11) that the Federal Energy Regulatory Commission rendered its decision on rehearing "in total ignorance of [petitioner's] argument" (Pet. 8) about the integration of its facilities with Florida Power's facilities, and that the court of appeals affirmed FERC's decision on grounds not articulated by the agency. Petitioner is mistaken on both counts.

As the court of appeals explained (Pet. App. A9-A10), FERC's July 2001 order identified petitioner's arguments on rehearing. See *id.* at B1-B5. For instance, FERC observed that petitioner had contended that its members' transmission facilities "are comparable to those of Florida Power" and necessary to provide the transmission service at issue. *Id.* at B5.

FERC, however, "disagree[d]" with petitioner's arguments. Pet. App. B5. In particular, FERC noted that petitioner did not dispute FERC's January 1996 finding that petitioner's members interconnect with Florida Power primarily at "single points used only to transfer power between the Florida Power transmission system and that of each [of petitioner's members]." *Id.* at B6. Therefore, when the court of appeals determined in this case that substantial record evidence supports FERC's January 1996 determination about interconnection, see *id.* at A10-A14, the court

simultaneously was upholding FERC's *articulated* reason for denying rehearing in July 2001.

2. Petitioner contends (Pet. 8) that the court of appeals' inability to explain one sentence in FERC's opinion on rehearing—in which FERC stated that petitioner had failed to argue or demonstrate its satisfaction of "the test" for integration (Pet. App. B6)—required the court to remand the entire case. The court of appeals, however, correctly recognized (*id.* at A10) that courts must uphold agency "decision[s] of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Bowman Transp., Inc.* v. *Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)). As discussed above, the court of appeals had no difficulty discerning the agency's path in this case.

3. Petitioner suggests (Pet. 10 n.4) that FERC "would have ruled differently" if it truly did consider petitioner's evidence. In support of that argument, petitioner primarily relies (Pet. 10) on the oral statement of a FERC Commissioner (now FERC's Chairman) that he was "not sure" why petitioner failed to submit evidence of integration with Florida Power that would have been persuasive. Pet. App. F1. Petitioner also cites (Pet. 10-11 n.4) a Notice of Proposed Rulemaking in a different proceeding that has not yet resulted in a final FERC rule, and two decisions that addressed distinct facts. Petitioner makes no attempt to demonstrate a specific inconsistency between FERC's denial of credits to petitioner in this case, and any other decision of the Commission or a court of appeals.

Indeed, FERC's industry-wide rulemaking on nondiscriminatory access to transmission services supports

the agency's decision here. Petitioner's evidence concerning possible integration is inadequate under the rulemaking's articulation of the integration test (see Pet. App. B5-B6) for exactly the same reason given in FERC's order denying petitioner's request for credits: petitioner's evidence showed only that its network is interconnected with Florida Power's network at identifiable points to transfer power, *not* that its facilities and Florida Power's facilities are jointly relied upon "for the coordinated operation of the grid." *Id.* at B6; see *id.* at B25-B28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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